

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BARBARA J. FRAZIER,	)	
	)	No. CV-09-3063-CI
Plaintiff,	)	
	)	ORDER GRANTING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND DENYING DEFENDANT'S
MICHAEL J. ASTRUE, Commissioner	)	MOTION FOR REMAND FOR
of Social Security,	)	ADDITIONAL PROCEEDINGS
	)	
Defendant.	)	
	)	

BEFORE THE COURT are Plaintiff's Motion for Summary Judgment and Defendant's Motion for Remand. (Ct. Rec. 13, 15.) Attorney Thomas Bothwell represents Barbara J. Frazier (Plaintiff); Special Assistant United States Attorney Michael Howard represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, **DENIES** Defendant's Motion for Remand for additional proceedings and remands the matter to the Commissioner for an immediate award of benefits.

**JURISDICTION**

Plaintiff applied for Supplemental Security Income (SSI) on May 30, 2006. (Tr. 113.) She alleged disability due to a learning disability with an onset date of June 1, 1996. *Id.* After benefits were denied initially and on reconsideration, Plaintiff requested a hearing before an administrative law judge (ALJ). A hearing

1 before ALJ R.S. Chester was held on October 28, 2008. (Tr. 22-51.)  
2 Plaintiff, who was represented by counsel, and vocational expert  
3 Fred Cutler (VE) testified. The ALJ denied benefits on September 4,  
4 2008, and the Appeals Council denied review. (Tr. 1-5, 11-21.) The  
5 instant matter is before this court pursuant to 42 U.S.C. § 405(g).

#### 6 STANDARD OF REVIEW

7 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
8 court set out the standard of review:

9 A district court's order upholding the Commissioner's  
10 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
11 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
12 Commissioner may be reversed only if it is not supported  
13 by substantial evidence or if it is based on legal error.  
14 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
15 Substantial evidence is defined as being more than a mere  
16 scintilla, but less than a preponderance. *Id.* at 1098.  
17 Put another way, substantial evidence is such relevant  
18 evidence as a reasonable mind might accept as adequate to  
19 support a conclusion. *Richardson v. Perales*, 402 U.S.  
20 389, 401 (1971). If the evidence is susceptible to more  
21 than one rational interpretation, the court may not  
22 substitute its judgment for that of the Commissioner.  
23 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
24 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

25 The ALJ is responsible for determining credibility,  
26 resolving conflicts in medical testimony, and resolving  
27 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
28 Cir. 1995). The ALJ's determinations of law are reviewed  
*de novo*, although deference is owed to a reasonable  
construction of the applicable statutes. *McNatt v. Apfel*,  
201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve  
conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
supports more than one rational interpretation, the court may not  
substitute its judgment for that of the Commissioner. *Tackett*, 180  
F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
Nevertheless, a decision supported by substantial evidence will

1 still be set aside if the proper legal standards were not applied in  
 2 weighing the evidence and making the decision. *Browner v. Secretary*  
 3 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
 4 there is substantial evidence to support the administrative  
 5 findings, or if there is conflicting evidence that will support a  
 6 finding of either disability or non-disability, the finding of the  
 7 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
 8 1230 (9<sup>th</sup> Cir. 1987).

#### 9 SEQUENTIAL EVALUATION

10 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
 11 requirements necessary to establish disability:

12 Under the Social Security Act, individuals who are  
 13 "under a disability" are eligible to receive benefits. 42  
 14 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
 15 medically determinable physical or mental impairment"  
 16 which prevents one from engaging "in any substantial  
 17 gainful activity" and is expected to result in death or  
 18 last "for a continuous period of not less than 12 months."  
 19 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
 20 from "anatomical, physiological, or psychological  
 21 abnormalities which are demonstrable by medically  
 22 acceptable clinical and laboratory diagnostic techniques."  
 23 42 U.S.C. § 423(d)(3). The Act also provides that a  
 24 claimant will be eligible for benefits only if his  
 25 impairments "are of such severity that he is not only  
 26 unable to do his previous work but cannot, considering his  
 27 age, education and work experience, engage in any other  
 28 kind of substantial gainful work which exists in the  
 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
 the definition of disability consists of both medical and  
 vocational components.

In evaluating whether a claimant suffers from a  
 disability, an ALJ must apply a five-step sequential  
 inquiry addressing both components of the definition,  
 until a question is answered affirmatively or negatively  
 in such a way that an ultimate determination can be made.  
 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
 claimant bears the burden of proving that [s]he is  
 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
 1999). This requires the presentation of "complete and  
 detailed objective medical reports of h[is] condition from

1 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
2 404.1512(a)-(b), 404.1513(d)).

3 The Commissioner has established a five-step sequential  
4 evaluation process for determining whether a person is disabled. 20  
5 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.  
6 137, 140-42 (1987). In steps one through four, the burden of proof  
7 rests upon the claimant to establish a prima facie case of  
8 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d  
9 920, 921 (9<sup>th</sup> Cir. 1971). This burden is met once a claimant  
10 establishes that a physical or mental impairment prevents her from  
11 engaging in her previous occupation. 20 C.F.R. §§ 404.1520(a),  
12 416.920(a). At step five, the burden shifts to the Commissioner to  
13 show that (1) the claimant can perform other substantial gainful  
14 activity; and (2) a "significant number of jobs exist in the  
15 national economy" which claimant can perform. 20 C.F.R. §§  
16 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,  
17 1498 (9<sup>th</sup> Cir. 1984).

#### 18 STATEMENT OF THE CASE

19 The facts of the case are set forth in detail in the transcript  
20 of proceedings and are briefly summarized here. Plaintiff was 31  
21 years old at the time of the hearing and had a fifth grade education  
22 which consisted of special education classes. (Tr. 40.) She  
23 testified she quit school when she became pregnant; she stated she  
24 was currently married but separated from her husband. (Tr. 33-34.)  
25 She testified she lived with her mother and had five children under  
26 the age of 18, for whom she was the primary caretaker. (*Id.*)  
27 Plaintiff reported she could not read or write but could do a little  
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1 math. (Tr. 35.) She had past work experience as a grocery bagger  
2 and an agricultural produce worker. (Tr. 35, 105.) She stated she  
3 could not work because of mental impairments. (Tr. 41.)

#### 4 ADMINISTRATIVE DECISION

5 At step one, ALJ Chester found Plaintiff had not engaged in  
6 substantial gainful activity since June 2, 2006, the alleged onset  
7 date. At step two, he found Plaintiff had severe impairments:  
8 "situational depression with anxiety; learning disorders, not  
9 otherwise specified; depressive disorder, complicated; cognitive  
10 disorder, not otherwise specified; and borderline intellectual  
11 functioning." (Tr. 13.) At step three, the ALJ found Plaintiff's  
12 impairments, alone and in combination, did not meet or medically  
13 equal one of the listed impairments in 20 C.F.R., Appendix 1,  
14 Subpart P, Regulations No. 4 (Listings). (Tr. 14.) At step four, he  
15 determined she was capable of light work with several non-  
16 exertional, mental limitations. In his discussion of the evidence,  
17 the ALJ found Plaintiff's subjective symptom testimony was not  
18 credible to the extent her alleged limitations were inconsistent  
19 with the RFC findings. (Tr. 16-19.) Based on the RFC and VE  
20 testimony, the ALJ concluded Plaintiff could still perform her past  
21 work as a grocery bagger and found she had not been under a  
22 disability since the date her application for SSI was filed. (Tr.  
23 21.)

#### 24 ISSUES

25 The primary issue is whether the matter should be remanded for  
26 additional proceedings or for an immediate award of benefits.  
27 Defendant concedes the ALJ erred at step three in finding Plaintiff  
28

1 did not meet Listing 12.05 because he failed to consider medical  
2 equivalence in light of Plaintiff's low IQ score (below 70) and  
3 additional severe impairments. He argues remand to the Commissioner  
4 for additional proceedings is required to resolve the issue of  
5 equivalence and continue the sequential evaluation if medical  
6 equivalence is not found. (Ct. Rec. 16.) Plaintiff argues she meets  
7 Listing 12.05C, based her low IQ and the ALJ's step two finding of  
8 severe depressive disorder. In the alternative, she argues the ALJ  
9 did not give legally sufficient reasons for rejecting her testimony  
10 and opinions of treating and examining mental health provides. She  
11 contends if properly credited, these opinions and her testimony  
12 clearly establish her impairments in combination equal Listing  
13 12.05C, and an immediate award of benefits is warranted. (Ct. Rec.  
14 14 at 12-20; Ct. Rec. 17 at 6-7.)

#### 15 DISCUSSION

16 The Commissioner has promulgated a "Listing of Impairments"  
17 that are "so severe that they are irrebuttably presumed disabling,  
18 without any specific finding as to the claimant's ability to perform  
19 his past relevant work or any other jobs." *Lester v. Chater*, 81  
20 F.3d 821, 828 (9<sup>th</sup> Cir. 1995). If a claimant's impairment does not  
21 meet the criteria specified in the Listings, he or she is still  
22 disabled if the impairment equals a listed impairment. 20 C.F.R. §  
23 416.920(d). If a claimant has more than one impairment, the  
24 Commissioner must determine whether the combination of impairments  
25 is medically equal to any listed impairment. 20 C.F.R. §  
26 416.926(a). A claimant's symptoms "must be considered in  
27 combination and must not be fragmentized in evaluating their  
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1 effects." *Lester*, 81 F.3d 821 at 829. A finding of medical  
2 equivalence must be based on medical evidence from acceptable  
3 medical sources only, i.e. licensed psychologists or physicians  
4 designated by the Commissioner. 20 C.F.R. §§ 416.929(d)(3), .926  
5 (c),(d)

6 "Longstanding policy requires that the judgment of a physician  
7 or psychologist designated by the Commissioner on the issue of  
8 equivalence on the evidence before the administrative law judge . .  
9 . must be received into the record as expert opinion evidence and  
10 given appropriate weight." *Social Security Ruling (SSR) 96-6p.*)<sup>1</sup>  
11 The Commissioner advises when the evidence suggests a judgment of  
12 equivalence may be reasonable and a medical judgment as to medical  
13 equivalence must be made by the ALJ, a medical expert must be  
14 called. *Id.* Remand for medical expert testimony and additional  
15 proceedings is warranted unless it is clear from the record that  
16 Plaintiff is disabled and no other issues are outstanding. *Benecke*  
17 *v. Barnhart*, 379 F.3d 587, 593 (9<sup>th</sup> Cir. 2004); *Lester*, 81 at 830,  
18 834; *Smolen v. Chater*, 80 F.3d 1273, 1291-92 (9<sup>th</sup> Cir. 1996); *Pitzer*,  
19 908 F.2d at 506; *Hammock v. Bowen*, 879 F.2d 498, 502 (9<sup>th</sup> Cir. 1989).

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21 <sup>1</sup> Social Security Rulings are issued to clarify the  
22 Commissioner's regulations and policy. They are not published in  
23 the federal register and do not have the force of law. However,  
24 under the case law, deference is to be given to the Commissioner's  
25 interpretation of the Regulations. *Ukolov v. Barnhart*, 420 F.3d  
26 1002 n.2 (9<sup>th</sup> Cir. 2005); *Bunnell v. Sullivan*, 947 F.2d 341, 346 n.3.  
27 (9<sup>th</sup> Cir. 1991).

1 Here, the Commissioner argues Plaintiff does not meet the  
2 Listing because she was not diagnosed with mental retardation.  
3 However, he concedes the case record suggests a judgment of  
4 equivalence may be reasonable and remand is necessary because the  
5 ALJ failed to consider Plaintiff's severe impairments in  
6 combination.

7 The requirements of Listing 12.05C (*Mental retardation*) are as  
8 follows:

9 Mental retardation refers to significantly subaverage general  
10 intellectual functioning with deficits in adaptive functioning  
11 initially manifested during the developmental period; i.e., the  
evidence demonstrates or supports onset of the impairment  
before the age 22.

12 The required level of severity for this disorder is met when  
13 the requirements in A, B, C, or D are satisfied.

14 . . .

15 C. A valid verbal, performance or full scale IQ of 60 through  
16 70, and a physical or other mental impairment imposing an  
additional and significant work-related limitation of function.

17 20 C.F.R. Pt. 404, Subpt. P, App.1, Section 12.05C.

18 Defendant cites no legal authority for his argument that, to  
19 meet Listing 12.05C, Plaintiff must be diagnosed with "mental  
20 retardation." (Ct. Rec. 16 at 4.) As explained in Listing 12.00,  
21 the structure of Listing 12.05 is "different from the other mental  
22 disorder listings." 20 C.F.R. Pt. 404 Subpt. P, App. 1, § 12.00A.  
23 There are four sets of criteria within the Listing (paragraphs A  
24 through D). Section 12.00A states clearly that if a claimant's  
25 impairment "satisfies the diagnostic description in the introductory  
26 paragraph and any one of the four sets of criteria," the impairments  
27 meet the Listing. There is no requirement for a formal diagnosis of  
28



1 "mental retardation." As discussed below, Plaintiff meets criteria  
2 of 12.05C.

3 The record shows Plaintiff's estimated full scale IQ is 72,  
4 verbal IQ is 66 and Performance IQ is 83; she attended school  
5 through fifth grade, was pregnant at age 14, and is functionally  
6 illiterate. (Tr. 111, 164-65.) This is substantial evidence of  
7 significant subaverage general intellectual functioning with  
8 deficits in adaptive functioning before the age of 22. As found by  
9 the ALJ, Plaintiff suffers other mental impairments that are severe  
10 "as that term is defined and utilized under the Social Security Act  
11 and Regulations." (Tr. 13.) See C.F.R. § 416.920(d).

12 Plaintiff argues the medical equivalence issue is moot because  
13 she meets the second prong of Listing 12.05(C). (Ct. Rec. 17 at 6.)  
14 Citing *Fanning v. Bowen*, 827 F.2d 631 (9<sup>th</sup> Cir. 1987), Plaintiff  
15 asserts the ALJ's step two finding that her severe depressive  
16 disorder more than minimally limits her ability to work establishes  
17 the second prong of the Listing. (Tr. 13.) In *Fanning*, the Ninth  
18 Circuit held "an impairment imposes a significant work-related  
19 limitation of function when its effect on a claimant's ability to  
20 perform basic work activities is more than slight or minimal."  
21 *Fanning*, *supra* at 633.

22 After *Fanning*, the Regulations were revised to clarify the  
23 application of Listing 12.05C:

24 [W]e will assess the degree of functional limitation the  
25 additional impairment(s) imposes to determine if it  
26 significantly limits your physical or mental ability to do  
27 basic work activities, i.e. is a "severe" impairment(s)\_  
as defined in §§ 404.1520(c) and 416.920(c). If the  
additional impairment(s) does not cause limitations that  
are "severe" as defined in §§ 404.1520(c) and 416.920(c) we

1 will not find that the additional impairment imposes "an  
2 additional and significant work-related limitation of  
function" . . . .

3 20 C.F.R. Pt 404, Subpt P, App. 1 § 12.00A. Thus, under *Fanning* and  
4 the Regulations, the ALJ's step two finding that Plaintiff's  
5 depressive disorder is severe, satisfies the second prong of Listing  
6 12.05C is met.

7 The decision to remand for further administrative proceedings  
8 or to reverse and award benefits is within the discretion of the  
9 court. *Benecke*, 379 F.3d at 593. As discussed above, the  
10 Commissioner concedes error at step three. Applying the Regulations  
11 to the fully developed record and the ALJ's findings, it is clear  
12 Plaintiff meets Listing 12.05C; further administrative proceedings  
13 would serve no useful purpose and remand for an award of benefits is  
14 appropriate. Accordingly,

15 **IT IS ORDERED:**

16 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is  
17 **GRANTED** and the matter is remanded to the Commissioner for an  
18 immediate award of benefits.

19 2. Defendant's Motion for Remand (**Ct. Rec. 15**) is **DENIED**;

20 3. Application for attorney fees may be filed by separate  
21 motion.

22 The District Court Executive is directed to file this Order and  
23 provide a copy to counsel for Plaintiff and Defendant. Judgment  
24 shall be entered for Plaintiff, and the file shall be **CLOSED**.

25 DATED October 4, 2010.

26 S/ CYNTHIA IMBROGNO  
27 UNITED STATES MAGISTRATE JUDGE  
28